RE DATUK ONG KIAN SENG @ ONG KENT CHEANG; EX PARTE DEVELOPMENT & COMMERCIAL BANK BERHAD

HIGH COURT, KUALA LUMPUR
DATO' DR. ZAKARIA M. YATIM J.
[CODE NO. D4-29-2999-91]
17 MARCH 1993

BANKRUPTCY: Judgment debtor opposing creditor's petition - Whether amount demanded in the bankruptcy notice was in accordance with the terms of the judgment • Whether bankruptcy notice was bad in law - Judgment debtor filing affidavit outside the time limited • Whether precludes judgment debtor from disputing bankruptcy notice.

The judgment creditor applied for a receiving order in respect of the estate of the debtor on the grounds that the debtor had failed to comply with the requirements of a bankruptcy notice issued and served on him.

The debtor filed an affidavit opposing the creditor's petition and Counsel for the creditor objected on the grounds that as the affidavit was not filed within seven days as prescribed in the bankruptcy notice, the debtor could not by his affidavit dispute the bankruptcy notice.

Counselforthedebtorcontendedthatthe amount demanded in the bankruptcy notice was not in accordance with the terms of the judgment or order and that the bankruptcy notice was therefore bad.

Counsel further contended that the amount specified in the order upon which the bankruptcy notice was founded was different from the amount stated in the bankruptcy notice which was in excess of more than RM30.000 and on these grounds sought to have the creditor's petition dismissed.

Held:

[1] The debtor's failure to file a notice as required under Rule 117 of the Bankruptcy Rules 1969 was only a formal defect and such defect did not cause substantial injustice to the petitioning creditor. The petitioning creditor was not misled by the debtor's affidavit. Although the debtor did not give notice to dispute the bankruptcy notice within the specified time, he was entitled to oppose the petition on the ground that the bankruptcy notice was bad in law.

[2] The calculation of interest as shown in the bankruptcy notice was not done in accordance with the the terms of the consent order on which the bankruptcy notice was based. It was explicit in the consent order that the creditor was only allowed interest at 18% per annum in respect of the sum of RM294,752.87 up to 30 June 1988. The interest charged from 1 July 1988 to 14 June 1991 as stated in the bankruptcy notice was therefore contrary to the terms of the consent order.

[3] The consent order did not authorise the creditor to split the proceeds of the sale of the property in the manner it was done in the bankruptcy notice. By splitting the proceeds of sale the creditor had not acted in accordance with the terms of the consent order.

[4] In the premises the demand for payment in the bankruptcy notice was not in accordance with the terms of the consent order as required by s. 3(l)(i) of the Bankruptcy Act 1967. The bankruptcy notice was therefore invalid and non-compliance with the bankruptcy notice did not constitute an act of bankruptcy on the strict construction of the Bankruptcy Act. As the creditor's petition was founded on an invalid bankruptcy notice, the creditor's petition must fail.

[Creditor's petition dismissed with costs].

Cases referred to:

Re a Debtor [1908] 2 KB 684 ***(refd)***

Re Ismail bin Baud & Anor. exp. Universal Life & General Insurance Sdn. Bhd.[1989] 2 CLJ 1043/ [1990] 1MLJ 118 ***(cit)***

Re Data Loh Fook Yen, ex parte Malayan United Finance Bhd. [1988] 3 MLJ 499 ***(cit)***

Re Arunachalam, Exparte Indian Overseas Bank Ltd. [1968] 1 MLJ 89 ***(refd)***

Exparte Dale [1876] 3 Ch. Div, 322 ***(refd)***

Re A debtor, ex parte the debtor v. Hungerford Rural District Council [1973] 1 All ER 797 ***(refd)***

Re Ley Boon Hee [1990] Mallal's Digest Yearbook, p. 9, Paragraph 51

Datuk Mohd. Sari bin Datuk Haji Nuar v. Norwich Winterthur Insurance (M) Sdn. Bhd. [1992] 4 CLJ 17981 [1992] 2 MLJ 344 ***(foll)***

Legislation referred to:

Bankruptcy Act 1967, ss. 3(1X1), 3 (2Xii), 131
Bankruptcy Rules 1969, Rules 117,274
Bankruptcy Act 1883, s. 4(1) (UK)
Bankruptcy Rules 1870, Rule 36 (UK)

For the Judgment debtor - Jasvinder Kaur; Mis. K.S. Narayanan & Co.

For the judgment creditor - Ranjit Singh; M/s. Manjit Singh Sachdev, Mohd. Radzi & Partners

JUDGMENT

Dr. Zakaria M. Yatim J:
In this creditor's petition, the creditor, the Development and Commercial BankBerhad asked the Court to make a receiving order in respect of the estate of the debtor.

According to the petition, the debtor was indebted to the petitioning creditor in the sum of RM322.642.72 as at 14 June 1991 being the amount due on a final judgment obtained by the c petitioning creditor against the debtor in the High Court at Kuala Lumpur vide Suit No. C23-1750-86 on 7 April 1988. The petition further stated that the debtor, within six months before the date of presentation of the petition had committed an act of bankruptcy, namely the debtor had failed to comply with the requirements of bankruptcy notice issued on 14 June 1991, which was served on the debtor on 8 July 1991 and an act of bankruptcy was thereby committed on 16 July 1991.

The debtor filed an affidavit affirmed on 18 February 1992 opposing the creditor's petition.

At the hearing of the petition, Miss Jasvinder Kaur, Counsel for the debtor referred to the judgment of Farwell LJ in *Re a Debtor* [1908] 2 KB 684, where the learned Judge said at p. 689, that under s. 4(1) of the Bankruptcy Act 1883 a y debtor committed an act of bankruptcy if a creditor obtained a final judgment against him and served on him a bankruptcy notice requiring him to pay the judgment debt "in accordance with the terms of the judgment" and the debtor failed to comply with such notice. She also referred to p. 690 of the judgment of the learned g Judge where he said that "the legislature says that the bankruptcy notice must be a notice requiringpayment in accordance with the terms of the judgment."

Miss Jasvinder also referred to s. 3(l)(i) of the Bankruptcy Act 1967 which provides that the bankruptcy notice requiring the debtor to pay the judgment debt or sum ordered must be in accordance with the terms of the judgment order. Shecited *Re Ismail bin Daud & Anor. exp. Universal Life & General Insurance Sdn. Bhd.* [1990] 1MLJ 118 where V.C. George J decided *inter alia* that so long as the amount decided was in accordance with the terms of the judgment or order and was quantifiable on the date of the notice such notice per se was not bad.

She then went on to state that the amount specified in the order upon which the bankruptcy notice was founded was different from the amount stated in the bankruptcy notice. She said that the amount stated in the bankruptcy notice was in excess of more than RM30,000.

Mr. Ranjit Singh, Counsel for the petitioning creditor raised a preliminary point with regard to the affidavit filed by the debtor on 18 February 1992. He said that the creditor's petition was served on the debtor on 11 September 1991 but it took the debtor five months to file the affidavit. He then referred to s. 3(2) proviso (ii) of the Bankruptcy Act and submitted that since the debtor did not file the affidavit within seven days as prescribed in the bankruptcy notice, the debtor could not by his affidavit dispute the bankruptcy notice. In support of his submission hecited *Re Dato Loh Fook Yen,ex parte Malayan United Finance Bhd.* [1988] 3 MLJ 499 where LC Vohrah J. said, at p. 500:

> I accordingly hold that the notice of dispute by way of the said affidavit has not complied with proviso (ii) to s. 3(2) of the Bankruptcy Act, having been deliveredeight days after the service of the bankruptcy notice, that is, outside the time allowed for payment. The bankruptcy notice therefore cannot be challenged as to the sum specified therein. In the result, the bankruptcy notice must be allowed to stand...

I note that in Data Loh's case, L.C. Vohrah J. followed the decision of Chang Min Tat J., as he then was in *Re Arunachalam, Exparte Indian Overseas Bank Ltd.* [1968] 1 MLJ 89. In that case, Chan Min Tat J. in his judgment at p. 90 said:

> On the authorities, it seems to me reasonably clear that where an excess is claimed in the bankruptcy notice and no such notice of dispute of the validity of the notice by reason of such excess is given, then the bankruptcy notice is not invalid, **merely by reason of the excess**.
> [Emphasis added].

From the passage quoted above, it is clear that where no notice was given by the debtor alleging that the sum demanded was in excess of the actual sum due, the notice remained valid only by reason of the excess.

In my view, although the debtor did not give notice to dispute the bankruptcy notice within the specified time, he was entitled to oppose the petition on the ground that the bankruptcy notice was bad in law.

The question that arises here is whether the affidavit filed by the debtor on 18 February 1992, was a proper application to set aside the bankruptcy notice at the hearing of the petition. Rule 117 of the Bankruptcy Rules 1969 provides that where a debtor intends to show cause against a petition, he shall file a notice with the registrar specifying the statements in the petition which he intends to deny or dispute and transmit to the petitioning creditor or his solicitor a copy of the notice three days before the day on which the petition is to be heard.

It is clear that under Rule 117 the debtor was required to file a notice in Form 10 that he intended to oppose the petition. The affidavit filed by the debtor was in fact an application to oppose the petition on the ground that the bankruptcy notice was bad in law and the petition ought to be dismissed with costs.

In my opinion the debtpr's failure to file a notice as required under Rule 117 was only a formal defect and such defect did not cause substantial injustice to the petitioning creditor. [See s. 131 of the Bankruptcy Act and Rule 274 of the Bankruptcy Rules]. I was satisfied that the petitioning creditor was not misled by the debtor's affidavit.

Rule 117 is similar to Rule 36 of the English Bankruptcy Rules 1870. InExparteDale [1876] 3 Ch. Div. 322, a debtor against whom a bankruptcy petition had been presented instructed his solicitor to oppose it. The solicitor inadvertently omitted to give the notice required by Rule 36 of the Bankruptcy Rules 1870, but he appeared at the hearing of the petition and asked to be allowed to dispute the validity of the petitioning creditor's debt. The Registrar refused to permit this and made an adjudication order. On appeal by the debtor, the Court held that the debtor ought to have been allowed to adduce his evidence and the adjudication order was accordingly annulled.

In the present case the affidavit filed by the debtor on 18 February 1992, was sufficient to give notice to the petitioning creditor that he intended to oppose the petition on the ground stated in the affidavit.

After raising the preliminary point Mr. Ranjit Singh then proceeded to reply to Miss Jaswinder's submission.

He submitted that the amount as stated in the bankruptcy notice was correct. He referred to s. 3(2) proviso (ii) of the Bankruptcy Act and said that even if the amount was in excess of the judgment sum, in the absence of any notice by the debtor within the time prescribed in the bankruptcy notice that the amount exceeded the judgment sum, the bankruptcy notice was not bad.

He cited a number of authorities in support of his argument. The first case he relied upon was *Re A debtor, ex parte the debtor v. Hungerford Rural District Council* [1973] 1 All ER 797, where Ungoed - Thomas J. in his judgment at p. 798 said:

> It was, however, maintained that the statement was inaccurate and the appellant relied on that inaccuracy. But s. 2 proviso (ii), of the Bankruptcy Act 1914 provides:
>
> > 'A bankruptcy notice ... shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due, unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such misstatement...'
>
> There is no evidence that the appellant within the time allowed gave notice to the respondents that he disputed the validity of the notice on the ground on which he now relies. The result, therefore, is that this ground of appeal fails.

He next referred to *Re Ismail bin Daud, supra,* where V.C. George J. said at p. 122,

> ... even if the amount demanded exceeds the amount actually due such a notice will not per se be invalid unless the debtor within the prescribed seven days gives notice to the creditor that he disputes the validity of the notice on the ground of the mistake ...

He also cited *Re Ley Boon Hee,* [1990] Mallal's **Digest Yearbook** p. 9 paragraph 51.

I respectfully agree with the authorities cited by Mr. Ranjit Singh but I think Miss Jasvinder Kaur's complaint was not confined to the question of excess only.

The main emphasis of her argument was that the amount demanded in the bankruptcy notice

was not in accordance with the terms of the judgment or order and that the bankruptcy notice was therefore bad.

In considering Miss Jasvinder Kaur's contention, it is necessary to examine sub section (1)(i) and sub section 2 proviso (ii) of s. 3 of the Bankruptcy Act. Section 3(l)(i) states as follows:

> If a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having seen stayed has served on him in the Federation, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in the Federation, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:
>
> Provided that for the purposes of this paragraph and of s. 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

Section 3 (2) proviso (ii) reads as follows:

> (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

It is clear that under s. 3(l)(i) above the creditor must have obtained a final judgment or a final order. Execution against the judgment or order has not been stayed. The bankruptcy notice must state the amount, which the debtor is required to pay within seven days after the bankruptcy notice has been served on him. The amount the debtor is required to pay must be in accordance with the terms of the judgment or order. Section 3 (2) proviso (ii) states that the bankruptcy notice shall not be invalidated by reason only that the amount specified in the notice exceeds the amount actually due.

The question to be considered here is whether the bankruptcy notice remained valid not only by reason that the sum specified in the notice exceeded the amount actually due but also by reason that the sum specified was not in accordance with the terms of the judgment or order.

Recently, the Supreme Court in *Datuk Mohd. Sari bin Datuk Haji Nuar v. Norwich Winterthur Insurance (M) Sdn. Bhd.* [1992] 2 MLJ 344, decided that the demand for payment in the bankruptcy notice issued by the respondent against the appellant was not in accordance with the terms of the consent judgment as required by s. 3 (1)(i) of the Bankruptcy Act but was in accordance with the terms of an agreement subsequently entered into by the parties, and therefore non-compliance with such notice could not constitute an act of bankruptcy on a strict construction of the Bankruptcy Act.

In that case a consent judgment was obtained against the appellant for a sum of RM530.000 together with interest thereon at the rate of 8% per annum from 5 June 1986 to the date of realisation and RM350 as costs. Subsequently the appellant offered through his solicitors to pay the said judgment sum by way of monthly instalments of RM25.000 each commencing January 1989. The offer was accepted by the respondent through its solicitors and the respondent issued receipts for seven instalment payments thereafter. No terms or conditions were stipulated to provide for the eventuality of a default in the payment of any instalment. The appellant could not pay the instalments for the months of August to December 1989, inclusive totalling a sum of RM125.000. The respondent issued a bankruptcy notice demanding payment of the sum of RM505.603.87 being the balance of the amount due on the final judgment. The appellant applied to set aside the bankruptcy notice but his application was

dismissed by the High Court. He then appealed to the Supreme Court. Gunn Chit Tuan SCJ, as he then was, in delivering the judgment of the Supreme Court said at p. 348 as follows:

> ... in the present case, the terms of the consent judgment were controlled by an outside agreement the judgment debtor and creditor through their solicitors, and non-compliance with the judgment is not an act of bankruptcy so long as the terms of the judgment are controlled by that outside agreement.
>
> ...There is no evidence ...whether the debtor had within the time allowed for payment given notice to the creditor that he disputes the validity of the said notice on the ground of mistake in it as the sum specified in the notice as the amount due exceeds the amount actually due.
>
> Be that as it may, **we were also of the view that the proviso (ii) to e. 3(2) was limited to excess demand and therefore not applicable to the instant case where the demand payment in the bankruptcy notice was not in accordance with the consent judgment as required by s. 3(l)(i) of the Bankruptcy Act** 1967 but was in accordance with the terms of an agreement subsequently entered into by the parties, **and therefore non-compliance with such notice could not constitute an act of bankruptcy on a strict construction of the Bankruptcy Act 1967.**
>
> As we considered that the bankruptcy notice was invalid for the various reasons stated, the appellant's application to set aside the bankruptcy notice in this case should have been allowed ...
> [Emphasis added].

It is clear that the principle laid down in *Datuk Mohd. Sari's* case is that s. 3(2) proviso (ii) is limited to excess demand only and does not apply to a situation where the demand for payment in the bankruptcy notice is not in accordance with the terms of the judgment or order as required by s. 3(lXi) of the Act. Non-compliance with such notice does not constitute an act of bankruptcy on a strict construction of the Bankruptcy Act. Such notice cannot be regarded as a valid notice.

Bearing in mind the principle laid down in Datuk Mohd. Sari's case, it is now necessary to examine whether the demand for payment as stated in the bankruptcy notice in the present case is in accordance with the terms of the final judgment or order.

On 7 April 1988, the petitioning creditor obtained a consent order against the debtor. The consent order was obtained in the following terms:

> UPON the application of Development & Commercial Bank Berhad, the plaintiff in the above action AND UPON READING the summons in chambers dated 8 September 1987, and the affidavit of Leong Sik Khoon affirmed on 7 September 1987, and both filed herein AND UPON HEARING Ms. Y.S. Chew of Counsel for the plaintiff abovenamed and mentioning for and on behalf of Counsel for the defendant abovenamed BY CONSENT IT IS ORDERED that the plaintiff be at liberty to enter summary judgment against the defendant in the sum of RM441.404.96 together with interest on the sum of RM294.752.87 at the rate of 18% per annum from 1 May 1986, to date of final payment and further interest on RM146.652.09 at the rate of 18% per annum from 1 May 1986, to date of final payment and costs of RM225 AND BY CONSENT IT IS ORDERED that the sum of RM280.000 obtained from the purported sale of the defendant's property held under Geran Mukim No. GM 915 Lot No. 5026 Mukim of Batu to One Lim Chiew Kee and in the event the sale is not abortive the sum of RM280,000 shall be deducted from the judgment sum and that in the event the purported sale is abortive the plaintiff shall be entitled to recover the total judgment amount due hereinbefore mentioned AND BY CONSENT IT IS FURTHER ORDERED that the defendant do pay the plaintiff the balance outstanding judgment sum together with all the accrued interest thereon by equal monthly instalments of RM25,000 commencing from 1 May 1988, until full settlement thereof AND BY CONSENT IT IS FURTHER ORDERED that in the event the defendant default in any one of the aforesaid instalment payment the plaintiff shall be at liberty to enforce the judgment order herein for the whole outstanding amount then due and owing AND BY CONSENT IT IS LASTLY ORDERED that the defendant do pay the agreed legal fees of RM5.000.
>
> Dated 7 April 1988.
>
> Sgd/-
> Senior Assistant Registrar,
> High Court, Kuala Lumpur.

In the bankruptcy notice the demand for payment was for the sum of RM322,642.72 as at 14 June 1991. The creditor arrived at this figure on the basis of its calculation as stated under the

"Particulars" at p. 2 of the bankruptcy notice, The particulars are as follows:

PARTICULARS

Decretal Sum	RM441,404.96
1. Fixed Loan	RM146.652.09
Add: interest from 1 May 1986 to 30 June 1988 @ 18% per annum.	RM 54,963.42
Less: Proceeds of sale	(RM201,615.51) Nil
2. Overdraft	RM294.752.87
Add: Interest from 1 May 1986 to 14 June 1991 @ 18% per annum.	RM191.049.34
Add: Costs	RM5,225.00
Less: Proceeds of sale.	(RM 78,384.49)
Payments	(RM 25,000.00) (RM 15,000.00) (HM 25,000.00) (RM 25,000.00)
	RM322,642.72
	RM322.642.72

According to the consent order the summary judgment entered against the defendant was for the sum of RM441.404.96 together with interest on the sum of RM294,752.87 at the rate of 18% per annum from 1 May 1986 to date of final payment and further interest on RM146,652.09 at the rate of 18% per annum from 1 May 1986, to date of final payment. It is clear that in the consent order, interests in respect of both figures, that is, RM294.752.87 and RM146.652.09 were to be calculated at the rates specified therein from 1 May 1986, to date of final payment.

In the bankruptcy notice interest in respect of RM294,752.87 as calculated from 1 May 1986 to 14 June 1991, but interest in respect of RM146.652.09 was calculated from 1 May 1986 to 30 June 1988.

It appears from the bankruptcy notice that the date of final payment in respect of the sum RM294.752.87 was 14 June 1991. This was the date the bankruptcy notice was issued. In respect of the sum RM146.652.07 the date of final payment was 30 June 1988. The consent order referred to one final payment in respect of both figures. In my view, the calculation of interests up to two different dates of final payment was not in accordance with the strict terms of the consent order.

It was not in dispute that the property referred to in the consent order was sold and that the creditor received the proceeds of the sale of the property in the sum of RM280,000 on 30 June 1988.

According to the consent order the sum of RM280.000 obtained from the sale of the property should be deducted from the judgment sum. The judgment sum including interest calculated up to 30 June 1988, should be RM648.248.19. After deducting the sum of RM280,000 there should be a balance of RM368,248.19 and after further deducting payments made from 30 June 1988 toSPebruary 1989 (RM90,000), the amount due and owing as at 3 February 1989 should be RM278,248.19.1 arrived at these figures based on a calculation I made in accordance with the terms of the consent order. My calculation is shown below:

The principal sum	RM441.404.96	
Interest sum from 1 May 1986 to 30 June 1988 on RM294,752.87.	RM144.599.91	
Interest from 1 May 1986 to 30 June 1988 on RM1 46,652.	RM 57,018.32	
Legal fees and costs	RM5,225.00	
Judgment sum as at 30 June 1988.	RM648.248.19	
Less proceeds of sale received.		RM280,000.00
	RM368.248.19	
Payments made from 30 June 1988 to 3 February 1989	RM 90,000.00	
Judgment sum due as at 3 February 1989.	RM278.248.19	

The creditor therefore could not charge interest on the sum of RM294,752.87 up to 14 June 1991, since the amount due and owing as at 3 February 1989, was only RM278.248.19. In my view the calculation of interest as shown in the bankruptcy notice was not done in accordance with the terms of the consent order.

In fact the creditor was not entitled to charge interest at 18% per annum, after receiving the proceeds of sale. Under the consent order the defendant was only required to pay the plaintiff "... The balance outstanding judgment sum together with all the **accrued interest** thereon by equal monthly instalments ..." [Emphasis added]. In my opinion, the words "accrued interest" refer to interest up to the date of sale, that is, 30 June 1988. It was explict in the consent

order that the creditor was only allowed interests at 18% per annum in respect of the sum of RM294,752.87 up to 30 June 1988. The interest charged from 1 July 1988 to 14 June 1991 as stated in the bankruptcy notice was therefore contrary to the terms of the consent order.

It is to be noted that in the bankruptcy notice the sum of RM280.000 obtained from the sale of the property was split into two figures namely, RM201.615 which was deducted from the sum of RM146.652.09 plus interest and 78,384.49 which was deducted from the sum of RM294.752.87 plus interest and costs. The consent order clearly stated that "... the sum of RM280.000 shall be deducted from the judgment sum..." It did not authorise the creditor to split the proceeds of sale in the manner it was done in the bankruptcy notice. Here again the creditor had not acted in accordance with the terms of the consent order.

Applying the principle laid down in *Datuk Mohd Sari's* case, I found that in the present case, the debtor did not raise only the question that the amount demanded in the notice was in excess of the amount actually due. The debtor indeed went furtherto state that the amount demanded in the notice was not calculated in accordance with the terms of the consent order. I was satisfied that, for the reasons stated above, the demand for payment in the bankruptcy notice was not in accordance with the terms of the consent order as required by s. 3(l)(i) of the Bankruptcy Act. The bankruptcy notice was therefore invalid and non-compliance with the bankruptcy notice did not constitute an act of bankruptcy on the strict construction of the Bankruptcy Act.

The creditor's petition was founded on the said bankruptcy notice and since the bankruptcy notice was not valid the creditor's petition must fail.

For the reasons stated above I dismissed the creditor's petition with costs.

RELIANCE OMNIBUS CO. SON. BHD. & ANOR.

v.

ISHAK BIN MOHD. JAAFAR & ANOR.

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CIVIL APPEAL NO. 12-9-92 (92)]
18 JUNE 1993

TORT: Roadaccident - Both vehicles travelling in same direction - Two conflicting versions of how accident occurred - Trial Court sought assistance fromother silent evidence,pleadings, sketch plan and police photographs - Trial Court rejected version of 1st plaintiff and found 1st plaintiff/rider of motorcycle wholly to be blamed for accident but held defendant wholly liable to 2nd plaintiff/pillion • Whethertrial Courtin concluding 1st plaintiff/rider wholly liable for accident could still find defendant wholly liable for the 2nd plaintiff/pillion's claim • Trial Court impressed by demeanour of certain witnesses - Whether appellate Court still has an obligation to scrutinize their evidence.

This was an appeal from the decision of the Sessions Court Judge, Kuala Kangsar, in respect of a claim for damages arising from an accident between a motorcycle ridden by the 1st plaintiff with the 2nd plaintiff seated as a pillion and a motor bus. At the conclusion of the trial, the Sessions Court Judge held that the 1st plaintiff was wholly to blame for the accident but held the defendants to be wholly liable for the 2nd plaintiff/pillion's claim.

Held:

[1] It is trite law that the finding of a trial Judge on which of the two conflicting versions of an accident is to be believed would normally be unassailable unless the appellate Court on reviewing the evidence forms the opinion that the Judge was clearly wrong.

[2] The trial Court having held the first plaintiff wholly to be blamed erred in concluding that h the defendants are wholly liable to the second plaintiff. The basic law of negligence is clear on this point that the person who is liable is the tortfeasor. In this instant appeal, the trial Court had held that the tortfeasor is the first plaintiff and not the second defendant.